Supreme Court, U.S.
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No. 91-1270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ANN RICHARDS, GOVERNOR OF TEXAS, *et al.*,
Appellants,

vs.

LOUIS TERRAZAS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPELLANTS' SECOND SUPPLEMENT TO JURISDICTIONAL STATEMENT AND OPPOSITION TO MOTION TO AFFIRM

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June 25, 1992

APPELLANTS' SECOND SUPPLEMENT TO JURISDICTIONAL STATEMENT

Pursuant to the Court's Rule 18.9, Ann Richards, Dan Morales, and John Hannah, Jr., respectively the Governor, the Attorney General, and the Secretary of State of Texas (appellants herein and hereinafter collectively termed "the state"), supplement for the second time their Jurisdictional Statement, based on developments of which they became aware only this morning, June 25, 1992:

Recent Development

On June 24, 1992, in the pending section 5 declaratory judgment action of *Texas v. United States*, No. 91-2383 (D.D.C.), the United States filed a Memorandum of the United States in Response to Plaintiff's Motion for Trial Setting. A copy of the United States' memorandum (omitting the certificate of service and cases attached to it) is attached to this second supplement.

The United States has concluded that, based upon analysis of the information (including the results of the 1992 primary elections under the interim court-ordered plan challenged in this appeal) developed during pretrial discovery:

> [W]e would not oppose the granting of a declaratory judgment by this Court that S.B. 1 is entitled to Section 5 preclearance. Therefore, as between the State of Texas and the United States, there is no need for a trial.

U.S. Memorandum at 3 (footnote omitted).

Significance of the Development

Although the D.C. district court has not entered an order yet, the position taken by the United States effectively

means two things related to this appeal: (i) S.B. 1 is now effectively a precleared, legislatively-enacted redistricting plan for the Texas Senate, *cf. Morris v. Gressette*, 432 U.S. 491 (1977) (Attorney General has non-reviewable discretionary authority to preclear legislative plans); and (ii) S.B. 1 is superior to the challenged interim court-ordered Senate redistricting plan in protecting minority voting rights, inasmuch as the D.C. federal district court litigation had pitted S.B. 1 against the challenged court plan, *see Texas v. United States*, 785 F.Supp. 201 (D.D.C. 1992).

The state's basic argument in this appeal -- that the November 18, 1991, administrative preclearance of the *Quiroz/Mena* state court-ordered plan constitutes preclearance of the January 8, 1992, legislatively-enacted S.B. 1, thereby leaving no vacuum for the Texas-based federal district court to fill through its January 10, 1992, order -- has found empirical validation.* Surely, at this point in the process (especially with the challenged preliminary injunction having run its course), *this* Court owes the state the federalism-based deference which the two-member majority of the district court never gave. Events have repudiated the United States' arguments for a contrary approach. *See* U.S. Br. at 13.

Furthermore, the invalidity of the Texas-based federal district court's globally-stated indication that S.B. 1 (*i.e.*, the *Quiroz/Mena* plan) violates section 2 of the Voting Rights Act has been further highlighted by the United States' filing of yesterday because, in the section 5 preclearance domain, the Department of Justice looks to whether a change would present a "clear violation of amended section 2." 28 C.F.R. § 51.55(b)(2). Apparently, its view is that S.B. 1

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* There is empirical validation, too, in the fact that we now have results from real elections which show the legislative plan clearly superior to the challenged court-ordered plan.

does not, notwithstanding the statements in the order challenged here.

Summary reversal is more than warranted. It would be a travesty (in a case whose only reason for being at this stage is to protect minority voting rights) to compel the state to put aside its legislatively-enacted Senate redistricting plan and use instead a court-ordered redistricting plan that is nearly universally-recognized to lessen the protection of minority voters in comparison to the state's precleared plan.

Respectfully submitted,

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June 25, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,	§	
Plaintiffs	§	
	§	
vs.	§	
	§	
UNITED STATES OF	§	
AMERICA,	§	Civil Action No. 91-2383
Defendant,	§	(PMW, U.S.C.A., JHG, SS)
AUSTIN NEGRETE, et al.,	§	
Defendant-Intervenors,	§	
and	§	
LOUIS TERRAZAS, et al.,	§	
Defendant-Intervenors.	§	

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO PLAINTIFF'S MOTION FOR TRIAL SETTING

Plaintiff State of Texas has moved this Court to schedule the trial of this case at the earliest possible date. In its Second Amended Complaint, the State seeks a declaration by this Court that S.B. 1, the redistricting plan for the Texas Senate enacted on January 8, 1992, is entitled to preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c ("Section 5").

On January 9, 1992, the State submitted S.B. 1 to the Attorney General for administrative review under Section 5. A timely objection was interposed to S.B. 1 on

March 9, 1992. Our determination letter explained that the Attorney General was objecting because the three-judge court in Terrazas v. Slagle, Civil No. A-91-CA-426, slip op. at 10 (W.D. Tex. Jan. 10, 1992), had concluded that S.B. 1 violated Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973, ("Section 2") and that ruling had not been vacated or reversed. See 28 C.F.R 51.55(b)(2) (the Attorney General shall withhold Section 5 preclearance when "a bar to implementation of the change is necessary to prevent a clear violation of Section 2"); 28 C.F.R. 51.56 ("the Attorney General will be guided by the relevant decisions of the . . . Federal courts"). Appeals from the rulings of the Terrazas court are pending in the United State Supreme Court.

On February 4, 1992, the State moved for partial summary judgment in the instant action, seeking alternative declaratory judgments that: (1) because S.B. 1 is substantively identical to the Quiroz/Mena plan which was precleared by the Attorney General on November 18, 1991, the Attorney General had already precleared S.B. 1; (2) the precleared Quiroz/Mena plan is the appropriate benchmark against which to measure S.B. 1 and, inasmuch as S.B. 1 is identical to that benchmark, there could be no retrogression; or (3) S.B. 1 is not subject to Section 5 review because the only change from the precleared Quiroz/Mena plan is the procedural mechanism by which it was adopted. In denying the State's motion, this Court concluded that the Terrazas court-ordered plan is the appropriate benchmark against which to compare S.B. 1 and that summary judgment

would be inappropriate to determine whether S.B. 1 is retrogressive with respect to the Terrazas plan and whether S.B. 1 was adopted with a discriminatory purpose. State of Texas v. United States, 785 F. Supp. 201 (D.D.C. 1992).

Pursuant to this Court's order of March 19, 1992, discovery closed on May 15, 1992. We have analyzed carefully the information we had obtained during the course of our administrative review of statewide redistricting plans in Texas, as well as the information we have obtained in discovery, including data concerning the 1992 elections under the Terrazas court plan. Based upon this information and our analysis, we would not oppose the granting of a declaratory judgment by this Court that S.B. 1 is entitled to Section 5 preclearance.[1] Therefore, as between the State of Texas and the United States, there is no need for a trial.

We note, however, that there are intervenors in the case who may continue to oppose Section 5 preclearance

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1 Inasmuch as the December 24, 1991 and January 10, 1992 orders of the Terrazas court do not constitute final judgments, neither the factual nor the legal findings of that court are preclusive in the case at bar. See, e.g., Ashe v. Swenson, 397 U.S. 436 , 443 (1970) (application of the doctrine of collateral estoppel requires determination of an issue of ultimate fact "by a valid and final judgment"); Starbuck v. City and County of San Francisco, 556 F.2d 450, 457, n.13 (9th Cir. 1977) ("a preliminary injunction . . . is not a final judgment sufficient for collateral estoppel purposes"). On the other hand, Section 5 preclearance does not "bar a subsequent action to enjoin enforcement of [S.B. 1]", 42 U.S.C. 1973c, pursuant to Section 2 or on other grounds. E.g., Mississippi State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245, 1261-62 (N.D. Miss. 1987); Major v. Treen, 574 F. Supp. 325, 327 n.1 (E.D. La. 1983).

of S.B. 1. See, e.g., City of Lockhart v. United States, 460 U.S. 125, 129-30 (1983) (intervenor defended district court's denial of Section 5 preclearance on appeal, while United States agreed with city's contention that voting changes were not retrogressive); City of Port Arthur v. United States, Civil Action No. 80-0648 (D.D.C. Jul. 14, 1982),[2] aff'd 459 U.S. 159 (1982) (intervenors opposed plan submitted jointly by the city and the United States); City of Richmond v. United States, 422 U.S. 358, 366-67 (1975) (intervenors opposed the consent judgment submitted to the district court by the city and the United States); City of Petersburg v. United States, No. 509-72 (D.D.C. Apr. 13, 1973),[3] aff'd mem. sub nom. Diamond v. United States, 412 U.S. 901 (1973) (the United States did not oppose a declaratory judgment preclearing annexations and a change to a ward system from an at-large method of election, but defendant-intervenors took an appeal).[4] A trial may be necessary if defendant-

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2 A copy of the unreported district court order is appended as Attachment A.

3 A copy of the unreported district court order is appended as Attachment B.

4 Compare Senate of California v. Smith, No. 81-2767 (D.D.C. Apr. 27, 1982) (intervention denied to applicants who would have opposed entry of declaratory judgment to which the United States consented) (copy appended as Attachment C) and State of Mississippi v. United States, Civil Action No. 82-2673 (D.D.C. Jan. 13, 1983), aff'd sub nom. Kirksey v. Mississippi, 464 U.S. 801 (1983) (intervention denied to applicants who opposed the joint motion of the State and the United States to dismiss a Section 5 declaratory judgment action following administrative preclearance by the Attorney General) (copy appended as Attachment D).

intervenors proffer evidence of a triable issue. If a trial is held, the United States reserves its right to reassess its position on preclearance based upon the evidence that may be adduced at such trial.

Respectfully submitted

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